IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2496 OF 2004

Budhadev Harendranath Ghosh, Age 42, Occupation : Goldsmith, Doing Goldsmithy work at Room No. 1, 3rd Floor, Bhagwati Dham, 13, Kavi Nirajlane, Old Satta Gully, S.K. Memon Street, Mumbai 400 002 ... Petitioner

Vs.

1. The Municipal Corporation of Gr. Mumbai having its office at Mahapalika Building, Mahapalika Marg, Mumbai 400 001.

2. The State of Maharashtra, Sachivalaya, Bombay 400 032. ...Respondents

Mr. R.A. Thorat with Ms. Vimla K. Gupta for Petitioner.

Mrs. A.R. Joshi for Respondents.

CORAM : F.I. REBELLO,J.
DATED : SEPTEMBER 30, 2004

ORAL JUDGMENT:

1. Rule. By consent of parties, heard forthwith.

2. The Petitioner is carrying on the profession or occupation of Goldsmith. Inspection of the premises was carried out on 31.8.2004. At the time of inspection, following articles were found in the premises : (1) Coal : 5 kg. (2) Sulfuric Acid : 100 ml (3) One Bhatti with one Blower and (4) dies :

5 Kg. (5) One Fire Extinguisher of 2 Kgs.

. Apart from that, the Inspector on measuring the

premises found that they admeasured 6.80 mtrs X 3.40 mtrs. There were four wooden tables and one hand press machine and at the relevant time six workers were found at the premises.

3. On the very same day, the Assistant Commissioner, C Ward was pleased to issue notice under Section 394(3) of the M.M.C. Act, 1988. In the said notice apart from what is set out from the inspection memo, it was set out that the process/operation of goldsmith was carried out by use of gas cylinders and stove and also acids which by their very nature are inflamable/explosive and hazardous, and the premises were also occupied by six number of workers. In the past also action have been taken against them. It was then set out that in view of the attending circumstances the keeping of any article or carrying on trade, process or operation is in opinion of the Commissioner, dangerous or likely to create nuisance with the meaning of Clause (d) or (e) (ii) of Sub Section. Reference is then made to Section 393(3) of the Act. It is then set out that the notice is issued for ensuring public safety and or to safeguard against any possible mishap of the type which took place on 31.5.2004 at Adukiya Mention Building No. 22, 2nd Pophalwadi, Bhuleshwar, wherein 24 persons died. After so setting out the Assistant Commissioner was pleased to observe that in exercise of powers under

section 394(4) the petitioner was directed to discontinue the said activity and operation in the said premises and area appurtenant thereto within 48 hours of the receipt of the notice failing which the Assistant Commissioner may be required to seize and carry away all the machinery, mechanical devices and/or equipments and tools. It was also set out that the acid and other materials seized which are of explosive nature may be disposed of or otherwise destroyed as may be deemed fit. That complaints regarding criminal offences will also be lodged against them for causing danger to life and property. On this notice being served, the petition came to be filed. An interim order came to be passed by this court on 3.9.2004 whereby respondent were directed not take any coercive steps against the petitioner in relation to the impugned notice.

4. On behalf of the Petitioner, it is pleaded that the accident which took place on 31.5.2001 was on account of faulty regulator and leakage of the gas cylinder. It is pointed out that the notice issued was vague and stereotyped and does not state which of the articles used by goldsmiths are dangerous to lives or create nuisance under Section 394(3). Similar stereotyped, cyclostyled notices have been served on several goldsmiths carrying on business in the locality. Earlier also certain gold smiths after receiving notices had filed a Writ Petition

bearing No. 2678 of 2001 in this Court. That came to be disposed of by order dated 25.10.2002. The learned Division Bench was pleased to issue various directions, including directing Respondent No. 1 therein to consider the reply submitted by the noticees under Section 394(3) and after hearing the petitioners therein to pass appropriate orders according to law. It is not necessary to refer to the other directions.

5. It transpires that one more petition being Writ Petition (L) No. 1495 of 2003 was filed against another notice issued under Section 394. A learned Single Judge of this Court observed that the notices were based solely on the conclusion stated and arrived at by the Jain Committee and not based o the satisfaction of the Commissioner and the report was also not disclosed to the petitioner. Interim relief was granted by order of 17.6.2003. This petition it is now pointed out pursuant to an order of 30.8.2003 in Writ Petition No. 2941 of 2002 has been tagged along with that petition and is pending. Thereafter several other petitions came to be filed being Writ Petition No. 2872 of 2003 and other petitions which came to be disposed of on 17.11.2003 on the Corporation making statement that they are withdrawing the notices.

6. The present petition as noted earlier is to

challenge the order of 31.8.2004. On behalf of the petitioner, their learned counsel contends that no licence is required to carry on business or profession or trade of gold smith and consequently the entire action of the Respondent is arbitrary and ultra vires the provisions of M.M.C. Act. It is submitted that the exclusion of precious metals (Gold and Silver) in Item (u) of Part IV of Schedule M clearly reflects the legislative intent that activity relating to treating precious metal, its hammering, drilling, polishing is not to be regulated under the provisions of Section 394 of MMC Act, 1888. It is then submitted that the work of the Petitioner considering the nature of the work, is not creating any nuisance and or is dangerous to life and property and therefore, not contrary to Section 394. At least the opinion formed by the Respondent No. 1 that is not supported by any material nor was the material made available to the Petitioners before passing the order. It is then submitted that the action of the Respondents in directing closure of the business is violative of Petitioner's fundamental right to carry on trade and business under Articles 19(1)(g) and 21 of the Constitution of India as also Article 14. It is also set out that the issuance of notice is mala fide considering that only a period of 48 hours was given for compliance.

. On behalf of the Respondent, no reply has been filed. It is, however, submitted that a perusal of Section 394 of the M.M.C. Act would by itself indicate that it is open to the commissioner in the circumstances set out therein including Section 394(1)(d) and (e)(ii) read with Sub Section (3) and (4) to take appropriate action in relation to any trade, process or operation which in the opinion of the Commissioner is dangerous to life, health or property or likely to create a nuisance either from its nature or by reason of the manner in which, or the conditions under which, the same is, or is proposed to be, kept or used or supported or allowed to be kept or used. Under Sub Section (3) on the notice being served under Sub Section 394(3) (a) and (b) the person keeping the article or carrying on trade/process/or operation is deemed to know that it is dangerous or likely to create a nuisance or dangerous to life, health or property.

7. For the purpose of considering the argument the relevant provision of Section 394 may be reproduced :

> "394 (1). Except under and in accordance with the terms and conditions of the licence granted by the Commissioner, no person shall :
>
> (a) keep, or suffer, or allow to be kept,

in or upon any premises, (i) any article specified in Part I of Schedule M; or, (ii) any article specified in Part II of Schedule M, in excess of the quantity therein specified as the maximum quantity (or where such article is kept along with any other article or articles specified in that Schedule, such other maximum quantity as maybe notified by the Commissioner) of such article which may be at any one time be kept in or upon the same premises without a licence;

(b) keep, or suffer or allow to be kept, in or upon any premises, for sale or for other than domestic use, any article specified in Part III of Schedule M;

(c) keep, or suffer or allow to be kept, in or upon any premises, horses, cattle or other four-footed animals for sale, for letting out on hire or for any purpose for which any charge is made or any remuneration is received, or for the sale of any produce thereof;

(d) keep or use, or suffer or allow to be kept or used, in or upon any premises, any article (or animal) which, in the

opinion of the Commissioner, is dangerous to life, health or property, or likely to create a nuisance either from its nature or by reason of the manner in which, or the conditions under which, the same is, or is proposed to be, kept or used or suffered or allowed to be kept or used;

(e) carry on or allow or suffer to be carried on, in or upon any premises;

(i) any of the trades specified in Part IV of Schedule M, or any process or operation connected with any such trade;

(ii) any trade, process or operation, which, in the opinion of the Commissioner, is dangerous to life, health or property or likely to create a nuisance either from its nature or by reason of the manner in which, or the conditions under which, the sae is, or is proposed to be carried on;

(f) carry on within Brihan Mumbai or use or allow to be used any premises for the

trade or operation of a carrier.

(2) The State Government may, by notification in the Official Gazette, add to, amend or delete any item in Schedule M and thereupon, the said Schedule shall be deemed to be amended accordingly but without prejudice to anything done or omitted to be done before such amendment.

(3) A person shall be deemed - (a) to have known that keeping any article (or animal) or carrying on a trade, process or operation is, in the opinion of the Commissioner, dangerous or likely to create a nuisance within the meaning of clause (d) or, as the case may be, paragraph (ii) of clause (e), of sub section (I), after written notice to that effect, signed by the Commissioner, has been served on such person or affixed to the premises to which it relates.

(b) to keep or to suffer or allow the keeping of an article (or animal) or to carry on or to allow to be carried on a trade, process or operation within the meaning of clause (I), or as the case may be, paragraph (ii) of clause (e) of sub section (l), if he does any act in furtherance of keeping of such article (or

animal) or carrying on of such trade, process of operation or is in any way engaged or concerned therein whether as principal, agent, clerk, master, servant, workman, handicraftsman, watchman or otherwise.

(4) If it appears to the Commissioner that the keeping of any article (or animal) or the carrying on of any trade, process or operation, in or upon any premises, is dangerous or likely to create a nuisance within the meaning of clause (d), or paragraph (ii) of clause (e), of sub section (l), the Commissioner may, by written notice, require the person keeping the article (or animal) or suffering or allowing it to be kept or the person carrying on the trade. Process or operation or allowing it to be carried on, as the case may be, to take such measures (including discontinuance of the use of the premises for any such purpose) as may be specified by him in such notice in order to prevent such danger or nuisance; and if such measures are not taken within the specified time, the Commissioner may seize and carry away or seal such article (or animal) or any machinery, or device used in connection with such trade, process or operations. Any article (or animal) or machinery or device so seized and carried away or sealed may be redeemed,

within a period of one month from the date of seizure, on payment of such sum and subject to such conditions as to future use or disposition of such article (or animal), machinery or device as may be fixed by the Commissioner in that behalf."

. Thus on a notice being served on a person under Section 394(1)(d) or (e) (ii) such person cannot carry on trade or business or keep an article or things except in accordance with the terms and conditions of a licence granted by the Commissioner. By virtue of Sub Section (4), the Commissioner can direct such person keeping the article or persons carrying on of any trade, process or operation, which in his opinion is dangerous or likely to create nuisance within the meaning of clause (d), or paragraph (ii) of clause (e) to take such measures including discontinuance of the use of the premises for any such process as to be specified by him in such notice in order to prevent such danger or nuisance and if such measures are not taken within the specified time, the Commissioner may seize and carry away or seal such article or any machinery or device used in connection with such trade, process or operations.

8. The question therefore, that requires to be

answered is whether the impugned order is vague , stereotyped and issued without application of mind and or is based on material not found on the premises at the time of inspection and therefore, could not have been considered and whether the order on that count is non est.

. From a reading of the section, it becomes clear that a trade, process or operation or keeping of any article or things requires licence in terms of what is set out in Schedule to Part M. Apart from that on following due procedure under Clauses (d) and (e)(ii) keeping of article or carrying of any trade, process or operations, if it is dangerous to life, health or property or constitutes a nuisance in the opinion of the Court Commissioner, can be prohibited.

. The order however, must disclose the basis for formation of opinion that it is dangerous to life, health or property or creates nuisance. In the instant case, Respondents have proceeded on the basis that the notice was being issued to ensure public safety and to safeguard against any possible mishap like which took place in Adukiya Mention Building No. 22, 2nd Pophalwadi, Bhuleshwar, on 21.5.2001 when 24 persons died. In that case admittedly there was use of a gas cylinder. In the instant case there is admittedly no gas cylinder

used in the premises. Charcoal is used as the metal for lighting a fire.

. Considering that we may now examine the notice issued. In the inspection report, there is no reference to any gas cylinder being found on the premises. However, notice issued proceeds on the footing that there was a gas cylinder. One of the items found in the premises was coal weighing 5 kgs. In Schedule M, under item (e) under combustible solids and semi solids it is open to the person to keep carbon or charcoal or lamp black or coke or coal and coal dust upto 100 kgs. without a licence. It was therefore, open to the petitioner to keep the charcoal found in the premises without licence. Sulphuric Acid upto 10 kgs can be kept without obtaining licence considering schedule M. In other words, that item also does not require licence to be obtained. The only other items found therein, were one bhatti with one blower and rubber goods and dies of 5 kgs. and one D.C. type fire extinguisher of 2 kgs. The notice does not show on what basis the Commissioner came to form an opinion that keeping of these articles on the premises or carrying on trade or process in precious metal with these articles is dangerous to life or public safety or is likely to create nuisance. Merely stating that opinion is formed is not sufficient. It must be based on material which can lead to that formation of

opinion. It is not possible from the order to find out the basis. It must be remembered that undisputedly the petitioner's right to carry on trade or business is involved. That can only be stopped or prohibited by following due process of law.

9. It is no doubt true that merely because articles found are of lesser quantity then for which licence is required under Schedule M, by itself cannot result in holding that the commissioner cannot issue notice under Section 394 (3). That will depend as to whether notice has been issued under Section 394(1) (c) which speaks of article or under 394(e)(ii) which speaks about carrying of any trade process or operation. In Schedule M Part IV are set out trades, process or a profession connected with the trades which cannot be carried on or alleged to be carried on in any premises without licence. In Part (u) are the following :

> "Metal (ferrous or non-ferrous or antimony but excluding precious metal) cutting or treating metal by hammering drilling, pressing, filling, polishing, heating or by any other process whatever or assembling parts of metal and manufacturing articles of metals."

. In other words it becomes clear that carrying on

of trade or any process or operation of precious metal does not require a licence. It cannot be disputed that gold ordinarily is known as precious metal. Manufacturing of articles therefore from gold would not require licence. Therefore, gold articles can be manufactured without licence. The Petitioner was therefore, within his rights of carrying on the trade or process of manufacturing gold ornaments or items without a licence. The Commissioner could not therefore, come to the conclusion that the carrying on the trade of manufacturing gold ornaments by itself is dangerous to public safety as that trade or process or manufacture could be carried out without a licence and with the usualo tools requierd for manufacture in the absence of any other material.

. It may however, be pointed out that under Section 394((1)(d) and 3(ii) are also covered trades, process or operations where licence may be required if any trade, process or operation, in the opinion of the Commissioner, is dangerous to life, health or property, or likely to create a nuisance either from its nature or by reason of the manner in which, or the conditions under which, the same is or is proposed to be carried on. ‘Public safety’ can be read into the expression dangerous to life, health or property. it would therefore, still be open to the Commissioner, if he was of the opinion that

carrying on process of gold smithy was dangerous to life to issue notice and order prohibiting carrying out of the trade or process of goldsmithy. That however does not mean that it will be open to the Commissioner for all times to prohibit the carrying on the trade of goldsmithy whkich otherwise can be carried on without a licence. Provision must be made for imposing conditions to carrying on the trade. The fundamental right to cary on trade can be subject only to reasonable restriction.

10. A reading of the order shows that it proceeds on the footing that there is an item which in fact was not found on the premises namely gas cylinder. Secondly the order proceeds on the footing that there is possibility of mishap as occurred on 31.5.2001 at Adukiya Mention Building No. 22, 2nd Pophalwadi, Bhuleshwar. In the absence of gas cylinder on the premises the order does not disclose how the mischief or damage could occur. Possibility of mishap by itself would not be sufficient to issue notice under Section 394(3). There must be material to show that keeping of bhatti with charcoal and presence of 150 ml of Sulphuric acid is hazardous to public safety. No material at least has been disclosed on what basis such an opinion is formed. Merely quoting from the section would not be sufficient. Considering the consequence of the order, the order must be self speaking. The court

in such matters may not go into the adequacy of the reasons but there must be material to indicate that there has been application of mind in arriving at the conclusion which the authority has arrived at.

11. Apart from that the effect of issuing notice under Section 394 would be amounting to imposing restrictions on the right of the petitioner to carry on his trade or business. The said right can only be taken away by due process of law meaning thereby Act, rules or any statutory enactments. In the instant case, there are no rules, nor any guidelines except the powers conferred on the Commissioner under Section 394. When such power is to be exercised, needless to say that a petitioner who is likely to be affected, must be given an opportunity of being heard and also informed of the material which is likely to be used. There is no provision in the section which excludes the right of hearing. In these circumstances, it must be inferred that when such power is to be exercised, it necessarily contemplates following a procedure which will include disclosing the material on which the prima facie opinion is to be formed, an opportunity to reply and thereafter issuing the notice. It must be immediately added that there may be occasions in which the commissioner may have to act urgently. In such rare occasions or emergency, it is possible to

exclude the right of hearing before the action is taken. Generally otherwise, notice must be given to persons likely to be affected and an opportunity to put up his case before any order is passed. In the instant case, that has not been done and consequently the order is liable to be set aside on that count also. This was not a case of emergency considering that the earlier incident took place sometime in the year 2002.

12. For all the aforesaid reasons, Rule made absolute in terms of Prayer Clause (a). However, it will be open to the Respondents if so advised and in terms of what is aforesaid in the judgement on issuing proper notice and complying with the necessary requirements of hearing to pass appropriate orders according to law which they may be entitled to.

. There shall be no order as to costs.

(F.I. REBELLO,J.)